MSS

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 385 OF 2000

USMAN BADESAHEB SHAIKH)
R/o Kurnur, Taluka Akalkot)
District Sholapur) ..APPELLANT

VERSUS

THE STATE OF MAHARASHTRA) ..RESPONDENT

Shri V. V. Purwant for appellant

Shri F. R. Shaikh, Addl. PP.

WITH

CRIMINAL APPEAL NO. 483 OF 2000

ANKUSH RAMA MORE)

R/o Kurnur, Taluka Akalkot)

Dist. Solapur. At present in)

Yeroda Central Prison, Pune.) ..APPELLANT

VERSUS

THE STATE OF MAHARASHTRA) ..RESPONDENT

Shri V. M. Thorat for appellant

Shri F.R. Shaikh, Addl. PP.

WITH

CRIMINAL APPEAL NO. 654 OF 2000

MARUTI SHANKAR SARVADE)

At present confined in Yeravada)
Central Prison, Pune-6) ..APPELLANT

VERSUS

THE STATE OF MAHARASHTRA) ..RESPONDENT

Shri Shekhar Ingawale for appellant
Shri F. R. Shaikh, Addl. PP

WITH

CRIMINAL APPEAL NO. 429 OF 2000

1. PEERSAHEB BADESAHEB SHAIKH)
R/o Kumtha, Tal.North Solapur
Dist. Solapur.)
2. KUTBUDDIN SAHEBLAL TAMBOLI)
R/o Hotagi, Tal.South Solapur
District Solapur.)
At present lodged in Solapur)
District Prison, Solapur) ..APPELLANTS

VERSUS

THE STATE OF MAHARASHTRA) ..RESPONDENT

Shri Rajan Salvi for appellants
Shri F.R. Shaikh, Addl. PP

CORAM: **SMT. RANJANA DESAI, &**
SMT. R. S. DALVI, JJ.

DATE ON WHICH THE JUDGMENT IS

RESERVED : 31ST JULY, 2007

DATE ON WHICH THE JUDGMENT IS PRONOUNCED: 21st AUGUST, 2007

JUDGMENT:-(Per Smt. Ranjana Desai, J.)

. In all these appeals, judgment and order dated 22nd May, 2000 passed by the Sessions Judge, Solapur in Sessions Case No. 126 of 1999 is under challenge. Hence these appeals can be disposed of by a common judgment and order.

2. The appellant in Criminal Appeal No. 385/2000 is original accused 1. Appellant in Criminal Appeal No. 483/2000 is original accused 2. Appellant in Criminal Appeal No. 654 of 2000 is original accused 3 and appellants in Criminal Appeal No. 429 of 2000 are original accused 4 and 5. All the accused were tried for offence punishable under Section 302 read with Section 34 and 120-B of the Indian Penal Code. The accused are referred to in this judgment according to their status in the trial court as "A-1, A-2, A-3, A-4 & A-5" for convenience.

3. According to the prosecution as disclosed from the evidence of PW 7 Vinod More, on the day of

incident i.e. on 5/4/99 deceased Brahmhanand More along with his son PW 7 Vinod had been to Solapur in the morning. They left their village Kurnur for Solapur at about 9 a.m. on motor cycle No. MVP 1154 owned by the deceased. They came to Akalkot. They parked their motor cycle there. Thereafter they proceeded to Solapur by ST Bus because they had work at Zilla Parishad, Solapur. They returned to Akalkot from Solapur by ST bus at about 3-30 p.m. After finishing their work at Akalkot both of them started returning to their village Kurnur at about 6 p.m. on motor cycle. Deceased Brahmhanand was driving the motor cycle while PW 7 Vinod was on pillion seat. They started proceeding to their village Kurnur by Akalkot Wagdari road which leads to south north direction and after crossing a distance of approximately half kilometre towards Wagdari when their motor cycle came near Sharan Math, three persons who were on the road, halted their motor cycle. They started assaulting the deceased with knife. PW 7 Vinod got down from motor cycle. He started running towards Akalkot. One of the assailants chased him. That assailant returned to deceased Brahmhanand after some time. All the three persons dragged the deceased by the side of the road and again attacked him with

knives. Thereafter one of them went towards western side and two of them went towards eastern side. The deceased who had sustained several injuries started proceeding towards Akalkot in injured condition. After crossing about 200 feet he fell down on the road on account of injuries sustained by him. By that time PW 7 Vinod More had come towards him. The deceased was not in a position to talk. One Sanjay Dattatraya Bhandare was proceeding towards Akalkot from Wagdari on motor cycle. On the request made by him Sanjay Bhandare halted his scooter. PW 7 Vinod disclosed the incident to him. By that time a tempo came from Wagdari. It was proceeding towards Akalkot. Both PW 7 Vinod and Sanjay Bhandare took the deceased in the tempo to Rural Hospital, Akalkot for treatment. However, the doctor at the Rural Hospital told PW 7 Vinod that his father was dead. He then went to Police Station Akalkot.

4. PW 17 Shri Khalid the police station officer recorded his statement which is treated as F.I.R. It is at Exh.-45. Investigation was started on the basis of the F.I.R. A-1 was arrested on 6/4/99, A-2 was arrested on 16/4/99, A-3 and A-4 were arrested on 20/4/99 and A-5 was arrested on

23/4/99. After completion of the investigation, the accused came to be charged as aforesaid.

5. In support of it's case the prosecution examined as many as 17 witnesses. The star witness of the prosecution is PW 7 Vinod More, the son of the deceased who has identified A-3, A-4 and A-5 in the identification parade. According to A-1 and A-2, they are falsely involved in the case on account of political enmity. A-3, A-4 and A-5 also contended that they are falsely involved in the crime. A-3, A-4 & A-5 examined DW 11 Nana Uttamrao Wankhede in support of their defence.

6. After perusing the evidence on record the learned Sessions Judge was of the view that the prosecution had proved its case beyond reasonable doubt. He, therefore, convicted all the accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced them to suffer imprisonment for life. He convicted them for offence punishable under Section 120-B read with Section 302 of the Indian Penal Code and sentenced them to suffer imprisonment for life. The substantive sentences were ordered to run concurrently. Being aggrieved by this order of

conviction and sentence the appellants/accused have approached this court.

7. We have heard the learned counsel appearing for the parties at some length. With the assistance of the learned counsel, we have gone through the evidence and record of the case.

8. Mr. Purwant, the learned counsel appearing for A-1 submitted that the learned judge erred in coming to a conclusion that A-1 and A-2 were party to any conspiracy to kill the deceased. He submitted that the prosecution has relied on the evidence of PW 13 and PW 14 to establish conspiracy. PW 13 Raosaheb Kale claimed that A-1 and two others came near the tempo adjacent to the Mallikarjun Temple at Akalkot where he and one Bhima Jadhav were waiting for the jeep and at that time he saw A-2 handing over money to A-4. Mr. Purwant submitted that PW 13 has not even referred to A-1.

9. Mr. Purwant submitted that the prosecution has also relied on evidence of PW 14 Pandurang Ambaji Dagade a hotel owner. He submitted that it is inconceivable that this witness would state that

six months prior to the incident in question which took place on 5/4/99, A-1 and A-2 had been to his hotel. It is not possible for PW 14 to remember after six months the conversation A-1 and A-2 had in his hotel. Besides if this witness had heard them saying that they would teach the deceased a lesson natural conduct of this witness should have been to inform the police or people about this plan of the accused. According to Mr. Purwant the evidence of this witness, therefore, does not inspire any confidence.

10. Mr. Purwant pointed out that A-1 was arrested on 6/4/99 and A-2 was arrested on 16/4/99 and the statements of PWs 13 and 14 were recorded on 9/5/99 i.e. one month after the arrest of A-1 and A-2. He submitted that it is, therefore, not known as to on what basis A-1 and A-2 were arrested on 6/4/99 and 16/4/99 respectively. The learned counsel submitted that apart from evidence of PWs 13 and 14 there is no other evidence on record to support the theory of conspiracy in which A-1 & A-2 had allegedly participated. The learned counsel submitted that since the evidence of PWs 13 and 14 is liable to be discarded, conviction of A-1 must also be set aside.

11. Mr. V. M. Thorat, the learned counsel for A-2 adopted the submissions of Mr. Purwant and submitted that for the same reason conviction and sentence of A-2 must also be set aside.

12. Mr. Ingawale, learned counsel appearing for A-3 submitted that the prosecution story rests on the evidence of PW 7 Vinod More, the son of the deceased. According to Vinod More he was the pillion rider of the scooter which was being driven by his father, the deceased. He has stated that when they were proceeding to Kurnur by Akalkot Wagdari Road and their motor cycle reached near Sharan Math, three persons asked them to stop the motor cycle. Accordingly they stopped their motor cycle. The three persons started attacking the deceased with knives. This witness claims to have seen the accused assaulting his father. He claims to have identified the accused in the identification parade. The learned counsel contended that identification parade is not held as per the guidelines laid down in the Criminal Manual. Therefore, the said evidence deserves to be rejected. He submitted that the accused were brought for the identification parade in ST bus to

Akalkot from Solapur. It is not the prosecution case that they were brought by ST bus in burkha. PW 7 Vinod More has also said that he came by bus to Akalkot S.T. stand. The learned counsel pointed out that DW 1 Nana Wankhede, Jailor of District Jail Solapur has produced record showing that the accused were directed to be produced before J.M.F.C., Akalkot for identification parade and they were taken by S.T. bus. They were brought by bus. The learned counsel submitted that, therefore, identification made by PW 7 Vinod deserves to be discarded because he had ample opportunity to see the accused at the S.T. Stand. Besides PW 7, the identifying witness has not given any specific role to the accused and hence the said evidence is of no value.

13. The learned counsel contended that A-3 was arrested on 20/4/99 and the identification parade was held one month after his arrest. The delay in holding the identification parade, is, therefore, fatal to the prosecution case. The learned counsel submitted that the alleged seizure of bloodstained clothes from the person of the accused at the time of his arrest on 20/4/99 is also suspicious. He submitted that the incident is dated 5/4/99. It is

inconceivable that for 15 days A-3 would wear the same clothes stained with blood. The learned counsel urged that evidence of PW 13 must also be discarded. He has stated that he attended the funeral of the deceased. If in fact he knew about conspiracy than his conduct of not informing any one about the same till his statement was recorded on 9/5/99 i.e. almost one month after incident, makes his evidence suspect. The prosecution has also not examined Bhimrao Jadhav, who was supposed to be with PW 13. Evidence of Bhimrao Jadhav would have supported the evidence of PW 13. The learned counsel contended that evidence of PW 14 must also be discarded because his statement is recorded one month after the incident.

14. Mr. Ingawale also submitted that there is no discovery of weapon at the instance of A-3 and discoveries made at the instance of the other accused cannot be used against A-3. In this connection he relied on the judgment of the Supreme Court in **Pohalya Motya Valvi v. State of Maharashtra, A.I.R. 1979 SC 1949**. The learned counsel submitted that in the circumstances the conviction and sentence of A-3 deserves to be set aside.

15. Learned counsel appearing for A-4 has addressed us. Learned counsel for A-5 is not present. However, the evidence as against A-4 and A-5 being almost similar, we have appointed him to appear for A-5 also. He adopted the argument of learned counsel appearing for A-1 A-2 and A-3. He submitted that if the evidence of identification parade is disbelieved the conviction of A-4 and A-5 will have to be set aside. He submitted that it is true that bloodstained clothes and weapons of assault have been recovered at the instance of A-4 and A-5 but that by itself will not establish the complicity of the accused. Morever the discovery evidence does not inspire confidence. If the identification evidence is disbelieved the substratum of the prosecution story goes away. A-3, A-4 and A-5 cannot, therefore, be convicted on the basis of remaining evidence.

16. The learned APP Shri Shaikh on the other hand submitted that the evidence on record is cogent and credible. No fault can be found with the identification parade evidence. The guidelines have been meticulously followed by the Naib Tahsildar who held the parade. If there are any

minor discrepancies they cannot vitiate the identification parade. In this connection the learned APP relied on the judgment of the Supreme Court in **Pramod Mandal v. State of Bihar 2005 SCC (Cri.) 75**. He also relied on the Supreme Court judgment in **State of Maharashtra v. Suresh, 2000 SCC (Cri) 263**. The learned APP submitted that no interference is necessary with the impugned order.

17. There can be no dispute about the fact that on 5/4/99 deceased Brahmhanand More was attacked by some persons near Sharan Math at a distance of about half K.M. from Akkalkot with deadly weapons and the deceased succumbed to death on account of the injuries sustained by him in that assault. Complaint was lodged by PW 7 Vinod More, the son of the deceased. PW 6 Dr. Momin who did post mortem on the deceased found 12 external injuries and 3 internal injuries. According to her cause of death was shock due to injury to lung and liver and multiple incised wounds.

18. We shall first deal with the evidence against A-1 and A-2. It is the case of the prosecution that the deceased was a political leader. One group in village Kurnur was headed by him and the

other group was headed by Swamirao Patil. Political rivalry between these two groups is the motive of the murder. The trial court has rejected this case and, in our opinion, rightly so because in the F.I.R. A-2's name is not mentioned. A-1's name is mentioned in a different context. It is stated that in 1998 the son of A-1 was attacked by one Balurao Kale and his sons and A-1 was under the impression that the said attack was at the instance of the deceased. According to the prosecution A-1 wanted to take revenge and that is why he conspired with the other accused and killed the deceased. Since the prosecution case that political rivalry is the motive is rejected, it is necessary to see whether A-1 wanted to take revenge because of the attack on his son allegedly arranged by the deceased and hence he hatched a conspiracy and killed the deceased with the help of the other accused. So far as revenge theory is concerned apart from PW 7's evidence and evidence of PW 14 there is no other evidence to substantiate it. Prosecution has not led any other evidence to establish this case. PW 14's evidence does not inspire confidence for the reasons which, we shall soon advert. It is not possible to accept the revenge theory only on the basis of PW 7's

evidence.

19. We will now examine the conspiracy theory. PW 13 is Raosaheb Kale. According to him he knew the deceased. On 5/4/99 he claims to have gone to sell agricultural produce at Adat Shop. For returning to his village he came to ST stand Akalkot at about 2-30 p.m. As the bus had already left he went near Mallikarjun Temple which is in front of S.T. Stand. According to him one Bhim Jadhav was with him. At about 4 or 4-30 p.m. A 2 along with A 4 and two others came to the hotel adjacent to Mallikarjun Temple. According to PW 13 Raosaheb Kale after taking tea A-2, A-4 and two others returned near the tempo adjacent to the temple where he and Bhim Jadhav were waiting. Raosaheb Kale has further stated that at that time A-2 handed over a bundle of currency notes of Rs.50 denomination each to A-4. A-2 then told A-4 and others that the deceased will proceed towards village Kurnur and hence they should do the work. Thereafter A-2 went towards S.T. Stand while three others went towards Wagdari Road. Raosaheb Kale has stated that thereafter he went to Kurnur by jeep. In the court Raosaheb Kale identified A-2, A-3, A-4 and A-5.

20. It is pertinent to note that the statement of this witness was recorded on 9/5/99 i.e. about a month after the incident. This delay itself makes the evidence of this witness unreliable. Besides, it is not established that this witness was in fact at Malikarjun Temple at the relevant time. He has not produced any evidence to establish that he had taken any agricultural produce for sale to Adat shop on that day. He has stated that he came to know about the murder of the deceased on the same day. It is surprising that though he had heard A-2 telling the other accused that the deceased would be going towards village Kurnur and that they should do the work and according to him he saw the money being exchanged, he should not have told this incident to anyone. He should have at least contacted the police. It is pertinent to note that to avoid being accused of unnatural conduct he first denied that he attended the funeral of the deceased but realising that it is difficult to deny this fact he immediately admitted that he had attended the funeral. At the funeral he had ample opportunity to talk to the people or even to the police who were present there. But he did not do so. He has not been able to offer any explanation

for this conduct.

21. To lend support to the evidence of this witness, the police could have recorded the statement of Bhim Jadhav, who was allegedly with him. Bhim Jadhav is not examined. In these circumstances, we find it difficult to place reliance on this witness. Besides it is humanly impossible for a man to remember such an incident and identify the accused in the court. This witness does not claim to know A-3 to A-5. In such a situation it was necessary for the police to hold identification parade. No identification parade is held. We, therefore, find it unsafe to rely on this witness.

22. The prosecution has also examined PW 14 Pandurang Dagade, the hotel owner. He has stated that he is running a hotel at village Kurnur. Villagers from Kurnur village including A-1 and A-2 used to visit his hotel. According to him six months prior to the date of incident i.e. 5/4/99, A-1 and A-2 had come to his hotel. According to him A-1 told A-2 that his son was attacked by persons from Kale family at the instance of the deceased. A-1 also told A-2 that they will have to

see the deceased (to settle account with the deceased). He further told him that he had one relative by name Peersaheb (A-5) and he has to be called for that purpose. A-1 and A-2 then left the hotel. According to PW 14 Pandurang Dagade, about one month prior to the date of incident A-1, A-2 and A-4 came to his hotel for tea. At that time A-1 stated that his son was attacked at the instance of the deceased and, therefore, the deceased has to be finished. A-2 also stated that A-1's son was attacked at the instance of the deceased by the members of Kale family. At that time A-4 demanded money. A-1 did not pay the amount at that time. He however, assured to pay the amount. He identified A-1, A-2 and A-4 in the court stating that he knows the said persons.

23. Statement of this witness is also recorded on 9/5/99 i.e. almost one month after the incident. Important omissions in his evidence are that he had not stated before the police that he heard A-1 telling A-2 that his son was attacked by the members of Kale family at the instance of the deceased and that A-2 also stated that A-1's son was attacked at the instance of the deceased. These omissions are in respect of the most vital

part of the prosecution story and make the prosecution story about conspiracy suspect. If this witness had heard such conversation he should have reported it to the police. He has not lodged any complaint. This unusual conduct makes him an unreliable witness.

24. Having perused the evidence of P.W. 13 and 14 on the aspect of alleged conspiracy to kill the deceased, we feel that a doubt is created about the existence of alleged conspiracy and motive. The prosecution has not been able to establish beyond reasonable doubt any meeting of minds, any concert or plan to do away with the deceased. The charge of conspiracy must, therefore, be set aside. The result is that the conviction and sentence of A-1 and A-2 must be set aside.

25. We must now turn to the prosecution case as regards A-3, A-4 and A-5. The prosecution has come out with a case that PW 7 identified A-3, A-4 and A-5 in identification parade. Discovery of bloodstained weapons and clothes is alleged against A-4 and A-5. Bloodstained clothes were seized from the person of A-3. Blood group of bloodstains found on the clothes is stated to be similar to the

blood group of the deceased.

26. We shall first deal with the evidence pertaining to the identification parade. A-3 and A-4 were arrested on 20/4/99 and A-5 was arrested on 23/4/99. The identification parade was held by PW 12 Tukaram Khonge, the Naib Tahsildar on 21/5/99 at Akalkot. In this connection it is necessary to see what the Supreme Court has said about evidentiary value of the identification parade evidence.

27. In **State of Maharashtra v. Suresh's case (supra),** the Supreme Court was dealing with the value of identification parade evidence. The relevant observations of the Supreme Court may be quoted:

> . "If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become

> unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held."

In the facts before it, the Supreme Court came to the conclusion that safeguards adopted by the Executive Magistrate were quite sufficient for

ensuring that the parade was conducted in the reasonably foolproof manner. The Supreme Court rejected the reasoning adopted by the High Court while disbelieving the identification parade evidence based on the evidence of two witnesses who had said that the accused were taken on foot from the police station to the place where the parade was conducted and that their faces were not covered during such transit. The Supreme Court observed that the minutes of the test identification parade conducted by the Magistrate who himself was examined as a witness contained the details of the steps adopted by him. Seven persons were kept ready in the room and the witnesses were kept in another room from where they could not see the suspect. Thereupon the suspect was brought from the lock-up with the help of two respectable persons and all precautions were taken to ensure that the witnesses would not see the suspect during their transit. Then the suspect was permitted to stand initially amongst the seven persons thereafter the witnesses were brought with the help of same respectable persons and witnesses were then asked to identify the person whom they saw on the crucial day. The Supreme Court observed that the safeguards adopted by the Magistrate were sufficient and the High Court

had niggled on unimportant details and came to a wrong conclusion that the test identification parade was irretrievably vitiated.

28. In **Pramod Mandal's case (supra)** there was a delay of one month in holding the identification parade. The Supreme Court observed that it is neither possible nor prudent to lay down any invariable rule as to the period within which the test identification parade must be held or the number of witnesses who must correctly identify the accused to sustain his conviction. The Supreme Court observed that these matters must be left to the courts of fact to decide in the facts and circumstances of each case. We must quote the relevant observation of the Supreme Court;

> . "It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is

laid down prescribing a period within which the test identification parade must be held, it would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims. They, therefore, have only to avoid their arrest for the prescribed period to avoid conviction. Similarly, there may be offences which by their very nature may be witnessed by a single witness, such as rape. The offender may be unknown to the victim and the case depends solely on the identification by the victim, who is otherwise found to be truthful and reliable. What justification can be pleaded to contend that such cases must necessarily result in acquittal because of there being only one identifying witness? Prudence, therefore, demands that these matters must be left to the wisdom of the courts of fact which must consider all aspects of the matter in the light of the evidence on record before pronouncing upon the acceptability or

rejection of such identification."

29. The above judgments of the Supreme Court indicate that though guidelines laid down by the High Court in the Criminal Manual have to be followed by the Special Executive Magistrate while holding identification parades, if there is minor breach of the said guidelines, identification parade evidence cannot be discarded on that ground. The totality of the evidence has to be taken into account. If the court finds that the Magistrate has taken good care to see that the accused are not seen by the identifying witnesses before the parade is held the identification parade cannot be faulted because of some minor irregularity. Similarly delay in holding the identification parade by itself is not fatal to the identification parade. Even if there is some delay, if the court is satisfied that the identification parade is held properly and that the said evidence inspires confidence, the identification parade cannot always be discarded on the ground of delay.

30. PW 7 Vinod, the identifying witness is the son of the deceased. His presence at the scene of offence can hardly be disputed because he took the

deceased to the hospital with the help of PW 9 Sanjay Bhandare. He has lodged the FIR. His presence is supported by the evidence of PW 9 Sanjay Bhandare. His claim that he had seen the assailants of his father cannot be disbelieved because he was the pillion rider of the scooter driven by his father, and the accused stopped the scooter and started assaulting the deceased. He had, therefore, ample opportunity to see the accused. Being the son he is not likely to allow the real culprits to escape and involve innocent people. Besides in his F.I.R. he has given the description of the accused and he has stated that, if they are shown to him, he will be able to identify them. It was argued that he has not ascribed any role to the accused and hence his identification of the accused must be discarded. We do not find any substance in this submission. In his evidence, he has stated that there were only three assailants. In the identification parade he has stated that the three accused were the persons who were with his father at the time of the incident. The only conclusion which can be drawn from this is that A-3, A-4 and A-5, whom he identified were his father’s assailants. Evidence cannot be so read as to make the criminal trial a

farce. In the circumstances, we are of the opinion, that identification of A-3, A-4 and A-5 by PW 7 Vinod in the identification parade can be relied upon.

31. PW 12 Tukaram Khonge, the Naib Tahsildar has stated that he received a letter on 10/5/99 from P.S.O. Police Station Akalkot asking him to hold identification parade. He requested Asst. Superindent of Police to keep the witnesses present on 21/5/99 in the Tahsil office and requested him to produce the accused in the court by covering their faces with black cloth. He asked two witnesses to remain present as panchas. He has stated that the accused were brought from District Jail, Solapur in burkha as directed by him. They were kept in a shed behind the building of Judicial Magistrate, First Class, Akalkot. According to him identifying witnesses were directed to sit in the office of Election Branch Tahsil office, Akalkot and the identification parade was held in the hall of Tahsil office, Akalkot. He has further stated that at the time of holding identification parade, he had taken care to ensure that no police officer remains present in the hall. According to him at the time of holding parade, the door and windows of

the hall were closed. He has categorically stated that he had taken care to ensure that the accused should not be seen by the identifying witnesses before holding the identification parade. He has further stated that with the help of his staff he produced 11 persons for the parade and before holding the parade he had asked the accused to change their clothes, if they want. According to him the accused changed their clothes. He has stated how the actual parade was held. He has stated that PW 7 Vinod More then identified A-3, A-4 and A-5. Evidence of Tukaram Khonge is satisfactory. He had arranged the identification parade carefully. The guidelines appear to have been followed. The defence has not made any dent in his evidence in the cross-examination.

32. Relying on the evidence of DW 1 Nana Wankhede, it was argued that the accused were brought to Akalkot by bus. Even PW 7 Vinod has stated that he came to Akalkot by bus and, therefore, PW 7 Vinod had opportunity to see the accused. This submission cannot be accepted because it is based on conjectures and surmises. There is no definite evidence that in fact PW 7 Vinod had seen the accused at the S.T. bus stand. Besides PW 12

Khonge has stated that he had instructed the police to produce the accused by covering their faces with black cloth. He has stated that the accused were produced before him covered with black cloth. Therefore, it is not possible to hold that the identifying witness had seen the accused.

33. Examined in the light of the judgments of the Supreme Court, we unhesitantly accept the evidence of PW 12 Tukaram Khonge and the identification parade held by him. In the facts of this case the delay in holding the parade in no way affects the evidentiary value of this evidence. Nothing has been brought on record to suggest that the police had any animus against the accused We, therefore, conclude that PW 7 Vinod identified A-3, A-4 and A-5 in the identification parade held by PW 12 Tukaram Khonge on 21/5/99.

34. That takes us to the evidence of recovery of bloodstained clothes at the instance of the accused. Though blood group of the deceased could not be identified the blood group of the blood found on his clothes which were seized is ’B’. It is not anybody’s case that anyone else apart from the deceased was injured.

35. PW 2 Yuvaraj Tathe is a pancha to panchnama Exh. 35 under which A-3 was arrested and his clothes were seized. He has proved panchnama Exh.-35. He has stated that on 20/4/99 one white Nehru Shirt and one white Payjama stained with blood were seized from the person of A-2 and sealed. In the cross-examination he has stood firm. The Chemical Analyser's report states that his clothes were stained with blood of 'B' group. It was argued that A-3 was arrested 15 days after the incident. It is impossible that he would wear the same clothes after 15 days. This criticism must be rejected because the panchnama states that the stains were faint. There is no discovery of weapon at A-3's instance. This is also a very material circumstance. If the prosecution wanted to concoct a false case nothing prevented it from foisting a discovery on A-3. There is, therefore, no effort to concoct a case against the accused.

36. PW 3 Bhaskar Kale is a pancha to memorandum and panchnama Exh.-37 and 37/A respectively under which on 23/4/99 at the instance of A-4 his blood stained clothes and a knife were seized from his home in village Kumtha. Human blood of 'B' group

was found on his full pant Art. 16. His shirt and knife discovered at his instance were found stained with human blood.

37. PW 4 is Balu Bhimrao Kale. He is pancha to memorandum Exh.-39 and panchnama Exh.-39-A under which on 25/4/99 clothes of A-5 and a knife were recovered at the instance of A-5 from his house at Hotgi. As per the Chemical Analyser's report his shirt and full pant had blood stains of 'B' group. Knife was found stained with human blood.

38. Finding of bloodstained weapons at the instance of A-4 and A-5 and finding of blood stains of 'B' group on the clothes of A-3, A-4 and A-5 is in our opinion a clinching circumstance. The accused have not been able to offer any explanation for this circumstance. When the panchas have supported the prosecution case, there is no reason to disbelieve the discoveries. Moreover the panchas and the investigating officer have clearly stated that the articles were sealed when they were seized under panchnama. The panchnama also states so. The discoveries at the instance of A-4 and A-5 have rightly been believed by the trial court. It is also pertinent to note that PW 17 Shri Khalid

the investigation officer has stated that on 4/6/99 he visited Nagdeo Textiles Solapur where A-3, A-4 and A-5 were working as labourers. He requested the Manager of Nagdeo Textiles to provide a copy of attendance sheet which was provided by the Manager. From the attendance sheet he noted that A-3, A-4 and A-5 were absent on the relevant day. We are, therefore, of the opinion that the prosecution has proved its case against A-3, A-4 and A-5 beyond reasonable doubt.

39. Relying on the Supreme Court's judgment in **Pohalya Motya Valvi's case (supra)** Mr. Ingawale has submitted that the discovery of weapons at the instance of the other accused cannot be used against A-3. Assuming Mr. Ingawale is right, even, if the discovery of weapons at the instance of the other accused is left out of consideration while dealing with the involvement of A-3, still on the basis of the identification of A-3 in the identification parade by PW 7 Vinod, which we have held to be reliable, conviction of A-3 can be sustained.

40. Taking an overall view of the matter, we are of the opinion that the order of conviction and

sentence of A-1 and A-2 must be set aside , but conviction and sentence of A-3, A-4 and A-5 must be confirmed.

41. Hence the following order:

. The impugned order of conviction and sentence passed by the Sessions Judge,Solapur convicting and sentencing A-1 Usman Badesaheb Shaikh and A-2 Ankush Rama More is quashed and set aside. They are on bail. Their bail bonds stand cancelled.

. Conviction and sentence of A-3 Maruti Shankar Sarvade, A-4 Peersaheb Badesaheb Shaikh and A-5 Kutbuddin Saheblal Tamboli for offences punishable under Section 302 read with 34 of the Indian Penal Code and under Section 120-B read with 302 of the I.P.C. and their life imprisonment on these counts is confirmed. The substantive sentences shall run concurrently.

. The appeals are disposed of accordingly.

JUDGE

JUDGE

FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 385 OF 2000
WITH
CRIMINAL APPEAL NO. 483 OF 2000
WITH
CRIMINAL APPEAL NO. 654 OF 2000
WITH
CRIMINAL APPEAL NO. 429 OF 2000

Office notes, office Memoranda of Coram, appearances, Court's orders or directions & Registrar's orders.	Court's or Judge's Orders
	Mr. V. V. Purwant for appellant (Appeal 385/00) Mr. V.M. Thorat for appellant (Appeal 483/00) Mr. Shekhar Ingawle for appellant (Appeal 654/00 Mr. Rajan Salvi for appellants (Appeal 429/00) Mr. F. R. Shaikh, Addl.PP in all the matters. **CORAM: SMT. RANJANA DESAI &**

SMT. R. S. DALVI, JJ.
DATED:-21/8/2007

P.C.:-

For the reasons separately recorded in the judgment dated 21/8/07 this court has passed the following order:

"The impugned order of conviction and sentence passed by the Sessions Judge,Solapur convicting and sentencing A-1 Usman Badesaheb Shaikh and A-2 Ankush Rama More is quashed and set aside. They are on bail. Their bail bonds stand cancelled.

Conviction and sentence of A-3 Maruti Shankar Sarvade, A-4 Peersaheb Badesaheb Shaikh and A-5 Kutbuddin Saheblal Tamboli for offences punishable under Section 302 read with 34 of the Indian Penal Code and under Section 120-B read with 302 of the I.P.C. and their life imprisonment on these counts is confirmed. The substantive sentences shall run

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The appeals are disposed of accordingly.

JUDGE.

JUDGE.